

ENTERED

April 21, 2021

Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

UNITED STATES OF AMERICA

VS.

MARCIAL MARTINEZ

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§

CRIMINAL ACTION NO. 7:19-CR-78-4

ORDER OF SEVERENCE

Marcial Martinez ("Movant") was convicted of violating 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A) and was sentenced to 300 months imprisonment with judgment entered on February 21, 2020.¹ Movant appealed the judgment of this court but that judgment has now been affirmed.² No further review was sought; thus, the judgment is now final. On November 23, 2020, Movant filed a motion invoking Rule 41(g) of the Federal Rules of Criminal Procedure to seek the return of certain property.³

Rule 41(g), Fed.R.Crim.P., permits a person aggrieved by an unlawful search and seizure, or aggrieved by the deprivation of property to file a motion for return of property. A Rule 41(g) motion filed in a criminal case that has already concluded is properly construed as a civil action for return of property.⁴ Such a proceeding is a suit against the United States for property or money, and is civil in nature, invoking the Court's general equity jurisdiction under 28 U.S.C. § 1331.⁵

Because his motion is properly construed as a civil action, Movant must comply with the Prison Litigation Reform Act (PLRA) and pay the \$505 filing fee or submit an application for leave to proceed in forma pauperis. Furthermore, his complaint is subject to the screening requirements of 28 U.S.C. § 1915A.⁶ Movant has not complied with the requirements of the PLRA.

Accordingly, the Court hereby orders that:

(1) The Clerk shall sever Movant's motion,⁷ and transfer the motion and this order to a civil case file, assigning a civil cause number to the proceedings.⁸ The parties shall be realigned, because Marcial Martinez is the true plaintiff in this suit against defendant United States of America. All

¹ Dkt. No. 185.

² Dkt. No. 225.

³ Dkt. No. 222.

⁴ *United States v. Clymore*, 217 F.3d 370, 373 n.6 (5th Cir. 2000) (citing *Pena v. United States*, 122 F.3d 3, 4 n.3 (5th Cir.1997)).

⁵ *Id.*

⁶ *Pena*, 122 F.3d at 4.

⁷ Dkt. No. 222.

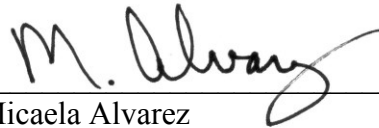
⁸ Such action is to be randomly assigned as a new civil action.

future pleadings related to Movant's motion for return of property shall be filed in the civil case file.

(2) Within thirty days of the entry of this order, Movant shall either: (a) pay the \$505 filing fee; or (b) submit a completed application to proceed in forma pauperis, along with a certified copy of his inmate trust account records, which must reflect the account balance as of November 23, 2020, as well as the deposits and average balance for the six months preceding that date.⁹ Failure to timely comply may result in dismissal of his cause for want of prosecution.¹⁰

IT IS SO ORDERED.

DONE at McAllen, Texas, this 21st day of April, 2021.

A handwritten signature in black ink, appearing to read "M. Alvarez", is written over a horizontal line.

Micaela Alvarez
United States District Judge

⁹ See 28 U.S.C. § 1915.

¹⁰ Fed.R.Civ.P. 41.